Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28

To: The Secretary

PETITION FOR RECONSIDERATION OF SMITHWICK & BELENDIUK, P.C.

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Smithwick & Belendiuk, P.C., pursuant to Section 1.106 of the Federal Communication Commission's ("FCC" or "Commission") Rules[1] hereby files its Petition for Reconsideration of the FCC's decision, *Protecting and Promoting the Open Internet, Report And Order On Remand, Declaratory Ruling, And Order in General Docket 14-28,* 2015 FCC LEXIS 731 (rel. March 12, 2015) ("*Open Internet Order*").

SUMMARY

In the *Open Internet Order* the Commission recognized that an oligopoly of broadband gatekeepers "hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."[2] The FCC ruled that broadband providers are offering a straightforward transmission service and as such they are common carriers subject to Title II of

[1] 47 C.F.R. §1.106.

[2] *Open Internet Order* at ¶ 8.

the Communications Act.[3] Simultaneously, the FCC decided to forbear from the vast majority of Title II provisions and associated rules.[4]

In its zeal to demonstrate that Title II can be applied with a "light touch" the FCC has tailored its "clear, bright line" rules too narrowly and exercised its forbearance authority too broadly. The asserted benefits of its "light touch" decision to forbear from applying the Truth-in-Billing rules, for example, are dubious and, moreover, compromise the FCC's stated policy goals of promoting competition and consumer choice. Limiting its "clear, bright line" rules to "paid prioritization," as opposed to banning all forms of prioritization, is fundamentally inconsistent with well-established common carrier obligations to transmit traffic indifferently. The "sponsored data" plans already implemented by broadband providers, and the innumerable forms of preferential treatment they have yet to devise, represent a type of unreasonable and unreasonably discriminatory conduct by those having gatekeeper control over essential services that has long been proscribed in this country. No further study or case-by-case analysis is required. Such practices must be found per se unreasonable and unreasonably discriminatory under Sections 201(b) and 202(a) of the Communications Act,[5] as they are nothing more than a broadband provider's intrusive control over content in consumerist or competitive garb.

As the *Open Internet Order* recognizes, all that the consumer wants is ubiquitous access and speed at an affordable price. All that the broadband provider has a right to provide is transmission of data at a guaranteed speed at a reasonable price. It provides bits and nothing more and may not prioritize content whether paid or unpaid, irrespective of its source.

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[3] *Open Internet Order* at ¶ 43.

[4] 47 U.S.C. § 251(c)(3) (unbundling).

[5] 47 U.S.C. § 201(b), 202(a).

The *Open Internet Order* leaves much to the enforcement process and adopts certain streamlining procedures, including the appointment of an ombudsperson. As long-time practitioners before the FCC, Smithwick & Belendiuk, P.C. has little confidence in the enforcement mechanism's ability to act in a timely and effective manner. The *Open Internet Order* consigns too many questionable practices to case-by-case determination, even granting the evolutionary nature of broadband Internet access. Filing and adjudicating a formal complaint with the FCC is often a lengthy, costly and uncertain undertaking. The rules place the burden of proof on the party filing the complaint, do not allow public participation by other interested persons, and ultimately resolve the complaint on an individual basis denying relief to others harmed by the unlawful conduct. Apart from complaints, the Enforcement Bureau routinely settles its investigations with the offending carriers long after the violations occurred, absent any finding or admission of wrongdoing, and for penalties and on conditions that are relatively mild with spotty monitoring for non-compliance. These proceedings are conducted in secret, the public having no opportunity to comment or often even know the basis for settlement.[6]

Finally, all of the measures adopted in the *Open Internet Order* are a regulatory deterrent of questionable efficacy to large company exploitation of gatekeeper control, primarily over last mile access to customers. The FCC has repeatedly stated that it seeks to promote competition, yet treads lightly on the heart of the problem – the reality that a few large gatekeepers control broadband transmission in this country and are determined to leverage that control over Internet

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[6] In limited space we will not provide a list; illustrative examples are easily found via web search coupling the terms "FCC," "Consent Decree" and "settlement" with "Verizon," "AT&T," or "Comcast."

access to their best advantage and to the disadvantage of consumers.[7] Rather than content itself with nipping around the edges, the FCC on reconsideration must apply its statutory authority to introduce competition into the broadband market by requiring broadband providers to make available to competitors stand-alone broadband transmission over the gateway last mile to the customer premises. The independent ISP market was healthy until 2005 when the FCC allowed broadband common carriers to cancel their offerings of stand-alone broadband transmission, forcing thousands of ISPs out of business. In the *Open Internet Order* the FCC effectively reversed this 2005 decision and on reconsideration it must restore the *status quo ante*.

I. INTRODUCTION

The physical and the virtual worlds are converging. Today more "things" are connecting to the Internet than people. This new Internet functionality endows previously passive objects with a "digital voice". The Internet of Things (IoT) is having a massive impact on how individuals and businesses use the Internet. For example, transportation companies are reducing fuel consumption using data captured, transmitted, and analyzed in near real-time. Local governments are making budgets go further with LED smart street lighting monitored and controlled remotely. Utility companies are relying on smart meters that report usage, outages, etc.

The range of "things" that can be part of an IoT solution is practically unlimited. From the small and simple to the large and complex, the possibilities are endless. Internet connected

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[7] In its *Memorandum Opinion and Order* in WC Docket Nos. 14-115 and 14-116, FCC 15-25, released March 12, 2015, the FCC takes a pro-competitive step by preempting several state restrictions on municipal infrastructure deployment.

smart cars are a reality. It is estimated that the number of cars connected to the Internet worldwide will grow to 152 million by 2020.[8] Wearable medical devices can transmit vital sign data from a patient at home to medical staff.[9] The Internet informs, educates, entertains and acts as a social gathering place for groups with diverse interests.

What do all of these devices and uses of the Internet have in common? The data they rely on to function properly must pass through networks. These networks are controlled by a handful of providers. The FCC in the *Open Internet Order* found that broadband Internet access is limited in key respects, specifically "Americans face a choice of only two providers of fixed broadband for service at speeds of 3 Mbps/768 kbps to 10 Mbps/768 kbps, and no choice at all (zero or one service provider) for service at 25/3 Mbps."[10] Today, only a few large corporations control access to the last mile of the Internet. These companies generally do not compete with one another, but rather have divided territories among themselves. This oligopoly has the motive and desire to control prices and access to the Internet without the normal constraints in a competitive market. As the *Verizon* court affirmed, "broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[11] Likewise the FCC concluded, "The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like."[12] "The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeepers standing

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[8] http://www.autonews.com/article/20140110/OEM06/301109910/the-race-to-market-the-connected-car

[9] *See generally*, http://www.wired.com/2014/06/connected-medical-devices-apps-leading-iot-revolution-vice-versa/

[10] Open *Internet Order* at ¶ 444.

[11] *Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir. 2014).

[12] *Open Internet Order* at ¶ 8.

between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls."[13]

By way of example, a Center for Public Integrity analysis of Internet prices in five U.S. cities and five comparable French cities found that prices in the U.S. were as much as 3 1/2 times higher than those in France for similar service. The analysis shows that consumers in France can choose among a far greater number of providers - seven on average - than those in the U.S., where most residents can get service from no more than two companies.[14] When it comes to Internet access, most Americans don't have much of a choice.

In the *Open Internet Order* the FCC found that broadband Internet access service is a "telecommunications service" subject to Title II regulation. The FCC chose a "light-touch" approach and exercised its statutory authority to forbear from the application of 27 provisions of Title II of the Communications Act, and over 700 Commission rules and regulations. Undeniably, the FCC's net neutrality rules are a step in the right direction. The rules prohibit blocking, throttling, and paid prioritization. Still there is a wide range of gatekeeper behavior falling outside the FCC's blocking, throttling and paid prioritization rules that impedes an open Internet. For example, AT&T has been testing the boundaries with its Sponsored Data program.[15] If companies pay AT&T a fee, their content is allowed to bypass AT&T's usage caps. AT&T can set arbitrary caps then charge companies to bypass them. Such a model puts smaller content providers at a huge disadvantage to their deeper-pocketed counterparts. This is

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[13] *Open Internet Order* at ¶ 20.

[14] http://www.publicintegrity.org/2015/04/01/16998/us-internet-users-pay-more-and-have-fewer-choices-europeans.

[15] https://www.techdirt.com/blog/wireless/articles/20150106/12150529611/despite-limited-interest-ats-sponsored-data-company-still-bullish-its-awful-precedent.shtml

an example of gatekeeper power on which the *Open Internet Order* declines to take a stand. Nor has the FCC taken any action against T-Mobile's Music Freedom initiative, which exempts the music of certain companies, chosen by T-Mobile, from a customer's data plans, except to say that such plans will be considered on a case-by-case basis. By giving these plans a free pass, the FCC is inviting large ISPs to concoct similar schemes in an end run around paid prioritization.

On reconsideration the FCC must outlaw novel prioritization arrangements that divvy up a customer's last mile transmission service into a batch of content provider fiefdoms. The FCC will be in the position of trying to unscramble eggs if it allows these plans to go forward subject only to individual case review, as it suggests. These few examples demonstrate that the *Open Internet Order*'s rules, as currently configured, leave too much room for preferential treatment by gatekeeper Internet broadband providers.

The only truly lasting solution to the gatekeeper control of the large broadband providers is for the FCC on reconsideration to open the last mile to competition by confirming the right of competing carriers to interconnect with broadband provider networks and by explicitly reversing its 2005 decision insofar as it allowed wireline telecommunications companies to cancel their stand-alone transmission offerings.

II. ARGUMENT

A. Any Form of Traffic Prioritization, including "Sponsored Data," is Fundamentally Inconsistent with Common Carriage Under Title II.

In establishing a "clear, bright line rule" banning paid prioritization and prioritization of affiliate traffic the *Open Internet Order* never addresses why it draws the line at "paid" prioritization, thereby implicitly allowing other forms of prioritization. If an open Internet stands

for anything, it means that a common carrier that is transmitting nothing but bits of data to and from its customers according to the customers' preferences may not interfere with what it is transmitting. Rather than leave questionable prioritization tactics, such as sponsored data plans, to cumbersome and costly, case-by-case proceedings under the general standards of just and reasonable, and no unreasonable discrimination, the FCC on reconsideration ought to proscribe all forms of prioritization, whether paid or unpaid, as fundamentally inconsistent with the obligations of common carriers.

1. The Rule Banning Paid Prioritization and Affiliate Prioritization is Too Narrow.

The *Open Internet Order* at ¶127 explains the ban on paid prioritization:

> Prioritizing some traffic over others based on payment or other consideration from an edge provider could fundamentally alter the Internet as a whole by creating artificial motivations and constraints on its use, damaging the web of relationships and interactions that define the value of the Internet for both end users and edge providers, and posing a risk of harm to consumers, competition, and innovation. Thus, because of the very real concerns about the chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment, we adopt a bright-line rule banning paid prioritization arrangements. (Footnotes omitted)

This reasoning is sound and supportable. However, the *Open Internet Order* never considers whether prioritization that does not involve consideration, monetary or otherwise, may produce the same harms and ought be proscribed. "[T]he chilling effects that preferential treatment arrangements could have on the virtuous cycle of innovation, consumer demand, and investment," clearly could obtain whether or not the broadband provider received consideration from the content distributor. The *Open Internet Order* does not address or reconcile its limitation of the ban to only "paid" prioritization in light of its findings on the harms of

preferential treatment. While it may be less likely for gatekeeper broadband providers to play favorites if there is no money in it for them, that is a poor excuse for stopping short of a ban on any traffic prioritization, paid or unpaid, affiliated or not. The *Open Internet Order* does not identify any forms of unpaid preferential treatment that may be legitimate and not have the same chilling effects as paid prioritization.

It is insufficient to brush off these concerns on reconsideration by relegating other prioritization schemes to case-by-case review. If the FCC is correct that strong and clear, bright line rules are needed to keep the Internet open, it has left the door ajar for the broadband providers to exploit their gatekeeper control in a myriad of preferential arrangements they will argue are unpaid. The FCC must shut this door on reconsideration. Should a broadband provider invent a type of preferential treatment that it believes does not run afoul of the FCC's policies, it may, of course, seek a waiver of the rule.

A common carrier makes service available to the public, who in turn "may communicate or transmit intelligence of their own design and choosing..."[16] The intelligence that customers transmit over a broadband provider's network is made up of bits of data. There is no reasonable basis for a carrier to treat data bits differently or prefer some to others. Unlike perishable goods that may require refrigeration by a rail or motor carrier and expedited delivery, digital transmission admits of no such special requirements. Any prioritization by a broadband provider of what a customer chooses to send or receive over its connection is anathema to the principles of common carriage and a truly open Internet.

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[16] *Open Internet Order* ¶551, n.1705.

On reconsideration the FCC must reconcile its implicit allowance of unpaid prioritization with its findings on the harms of preferential treatment and with established principles of common carriage, and finding them irreconcilable, must ban all traffic prioritization.

2. "Sponsored Data" Plans Allow Broadband Providers to Play Favorites and Exert Undue Leverage on Content Providers With Dubious Public Benefits.

The *Open Internet Order* at ¶¶151-2 devotes two paragraphs to the so-called "sponsored data" plans, reciting the views of the commenters, pro and con, in the first paragraph. The second paragraph contains the FCC's analysis:

> We are mindful of the concerns raised in the record that sponsored data plans have the potential to distort competition by allowing service providers to pick and choose among content and application providers to feature on different service plans. At the same time, new service offerings, depending on how they are structured, could benefit consumers and competition. Accordingly, we will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary. (Footnote omitted)

This decisional paragraph does not evaluate the merits of the comments or weigh the pros and cons. It simply punts consideration of sponsored data plans to individual case-by-case proceedings under the "no-unreasonable interference/disadvantage" standard adopted in the *Open Internet Order*. This is most unfortunate both substantively and procedurally and must be reconsidered. Preservation of an open Internet mandates a clear, bright line rule outlawing any preferential treatment of customer content by a broadband provider whether by pricing, data allowances or other device.

The distinction the *Open Internet Order* draws between "technical" prioritization and other forms, such as exemption from data plans, is meaningless because they have the same

pernicious effects on Internet openness. Both forms of prioritization violate the fundamental principle that a common carrier providing a transmission service, bits of data via a broadband connection, may not interfere with or prefer the bits transmitted. Allowing broadband providers to decide which content providers' bits will or will not count against a customer's data plan gives them control and leverage over Internet traffic that is unprecedented and wholly inappropriate for a Title II transmission service.

The *Open Internet Order* opines that such plans could benefit consumers and competition, depending on how they are structured. The bankruptcy of this view is illustrated by the comments of Free State Foundation, an industry advocate, referenced by the *Open Internet Order* at n.362:

> [T]he reality is that in order for the "next Google" or the "next Facebook" to compete against those well-entrenched giants, *the putative new entrant might well be looking to negotiate some arrangement with a service provider* that will give it a fighting chance of competing with the entrenched giants by differentiating itself. (Italics added)

Perhaps Verizon, AT&T and Comcast will welcome a fledgling company that might become another Google, and *negotiate some arrangement* with the start up to help it gain a foothold in the market. And these *well-entrenched giant* telecommunications and cable companies will do this for what in return? Are the gatekeeper, broadband providers to be anointed as kingmakers? What is called for here is a clear, bright line rule that will keep these well-entrenched giants out of content manipulation to further their own ends. Broadband providers are in the transmission business, not the content business.

Procedurally, leaving sponsored data plans to individual case evaluation will be difficult, if not impossible to regulate. Practitioners before the FCC know well that such proceedings as

these are fact based, require nuanced interpretation of general legal standards, take a long time to complete, are costly, and are subject to review and appeal. And the industry sponsors of these plans, if the FCC does indeed commence proceedings rather than simply look the other way, are famously known for their dilatory tactics and for replacing offending plans under investigation with new plans that are somewhat different, rendering the proceedings moot prior to decision. It is precisely to avoid such a morass that the *Open Internet Order* favors strong and clear, bright-line rules. Inexplicably the *Open Internet Order* gives a green light, or at best a blinking amber light, to "sponsored data" plans, leaving broadband gatekeepers with the power to influence content to the point that an open Internet is compromised.

B. The Forbearance Decisions Are Overly Broad, Jettisoning Sound Rules Developed Over Many Years.

1. Forbearance Necessitates A Clear Directive to Broadband Providers to Comply with Last Mile Interconnection Requirements.

The Telecommunications Act of 1996 imposed a set of new obligations on incumbent local exchange carriers, including the duty to provide competing carriers access to unbundled network elements at cost-based rates. [17]

In the *Cable Modem Order*[18] the FCC determined that Internet access services provided by the cable companies were inexorably linked to telecommunications. At that time broadband Internet access providers played a prominent role in the user's Internet experience. Thus the

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[17] *See* 47 U.S.C. §§ 251(c)(3), 252(d)(1). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996).

[18] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-785, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, (2002) (*Cable Modem Order*), *aff'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

FCC found that cable modem providers offered broadband transmission that was integrated with other features and services within their networks. As such it classified cable broadband as an information service.

In 2005, the FCC went a step further when it concluded that telecommunications companies providing broadband connections to the Internet were no longer required to offer the wireline broadband transmission component of wireline broadband Internet services as a stand-alone telecommunications service under Title II.[19] The Commission determined that wireline broadband Internet access service provided by a telecommunications company was an information service, rather than a telecommunications service, and therefore was not subject to Title II regulation. Citing the Supreme Court's Decision in *Brand X*, the FCC reasoned "Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[20]

The Commission in the *Broadband Access to the Internet Order* based its decision on two primary findings, (1) that broadband Internet service is an integrated information service, and (2) that the broadband Internet providers would have sufficient financial incentives to permit independent ISPs to provide competing Internet services.

The Act defines "information service" as

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic

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[19] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02- 33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005). (*Broadband Access to the Internet Order).*

[20] *Broadband Access to the Internet Order*, p. 14860, citing *Brand X.*

> publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[21]

The Act also defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"[22] and "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[23]

Applying the definitions of "information service," "telecommunications," and "telecommunications service," the Commission found that wireline broadband Internet access service "inextricably combines the offering of powerful computer capabilities with telecommunications," and is an information service.[24]

The FCC's 2005 decision to allow wireline common carriers to discontinue their tariff offerings of stand-alone broadband transmission was predicated on its belief that the large gatekeeper providers would nevertheless continue making broadband transmission available to independent ISPs.[25] Likewise, the Commission reasoned that the cable operators, which have never been required to make Internet access transmission available to third parties on a wholesale basis, would have business incentives to make such transmission available to ISPs.[26] "Incumbent LECs have represented that they not only intend to make broadband Internet access

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[21] 47 U.S.C. § 153(20).

[22] 47 U.S.C. § 153(46).

[23] 47 U.S.C. § 153(43).

[24] *Broadband Access to the Internet Order*, p. 14864.

[25] *Broadband Access to the Internet Order*, p. 14887.

[26] *Broadband Access to the Internet Order*, p. 14887.

transmission offerings available to unaffiliated ISPs in a manner that meets ISPs' needs, but that they have business incentives to do so."[27] The FCC assured the public that it was not sacrificing competitive ISP choice for greater deployment of broadband facilities. Rather, "our reasoned judgment tells us that sufficient marketplace incentives are in place to encourage arrangements with innovative ISPs."[28]

Unfortunately, this did not prove to be the case. As a result of the FCC's decision, up to 7,000 independent ISPs were forced out of business.[29] What is left today is a paucity of competition. Increasingly American's are faced with a Hobson's choice for broadband Internet access; they can have any broadband Internet provider they like as long as it is the large cable or telecommunications company that serves their area.

Information services like email and web hosting that the FCC in 2002 viewed as being inexorably linked with broadband transmission are today provided primarily by entities unaffiliated with the broadband provider and are separate and distinct from the transmission service. Third parties, such as Google, primarily handle consumers' email.[30] Web hosting is competitively provided. Furthermore, many end-users' "web presence" is now associated with third party applications such as Facebook and Twitter. Broadband customers now demand, and broadband providers supply, a pure telecommunications service to receive and deliver data, voice, video, text, and images. When a broadband customer uploads a video to YouTube,

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[27] *Broadband Access to the Internet Order*, p. 14893-4.

[28] *Broadband Access to the Internet Order*, p. 14895.

[29] http://newnetworks.com/killingispscreatednetneutrality/

[30] See "Gmail Opens Increase 243%; Android Drops Back to #4," Litmus, February 7, 2014, which identifies at least 86% of email opens being associated with Gmail, Outlook.com, Yahoo, and AOL. https://litmus.com/blog/gmail- opens-increase-android-drops-january-email-client-market-share

updates a Facebook page, posts on a blog, or shares files, all that is needed from the broadband provider is pure transmission.

In the *Open Internet Order* at ¶43, the FCC found that "times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a 'telecommunications service.'" As discussed, the FCC also found that broadband Internet providers function as gatekeepers and that they have the ability to control access to the last mile of the Internet. Despite its unequivocal findings, the FCC did not open the last mile to competition. The FCC decided instead to forbear from key interconnection provisions vital to competition. The Commission concluded that the availability of other protections adequately address concerns about forbearance from the interconnection provisions under the Section 251/252 framework and under Section 256.

> We thus forbear from applying those provisions to the extent that they are triggered by the classification of broadband Internet access service in this Order. The Commission retains authority under sections 201, 202 and the open Internet rules to address interconnection issues should they arise, including through evaluating whether broadband providers' conduct is just and reasonable on a case-by-case basis. [31]

The FCC went on to say,

> We also reject arguments suggesting that we should not forbear from applying sections 251(b) and (c) with respect to broadband Internet access service.... Section 251(c) subjects incumbent LECs to unbundling, resale, collocation, and other competition policy obligations.[32]

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[31] *Open Internet Order* at ¶513.

[32] *Open Internet Order* at ¶514.

In the *Open Internet Order*, *passim* the FCC repeatedly and consistently states that its new rules are designed to ensure that telecommunications networks develop in ways that foster economic competition, technological innovation, and free expression. As discussed herein, the Commission found that competition for broadband Internet access service is limited, with the majority of Americans facing a choice of only two providers.[33] Yet, for reasons that are not explained in the *Open Internet Order,* the FCC decided to forbear from the interconnection requirements of the Telecommunications Act of 1996, except to make a vague reference to its authority to resolve interconnection issues, should they arise, under Sections 201 and 202.

The *Open Internet Order* therefore does nothing to open the telephone and cable broadband markets to competition, which is sorely needed, since the FCC's 2005 predictive judgment has been proven erroneous. Clearly, the broadband gatekeepers have no economic incentive to open their gates and enable competing ISPs to enter the broadband Internet market.

The *Open Internet Order* found that circumstances have changed since the FCC decided it would no longer require common carriers to offer broadband transmission separately from broadband Internet access service. It found at ¶43, that "times and usage patterns have changed and it is clear that broadband providers are offering both consumers and edge providers straightforward transmission capabilities that the Communications Act defines as a 'telecommunications service.'" Likewise, the FCC found that broadband providers have the market power and the means to engage in predatory practices. These near monopoly broadband

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[33] Open *Internet Order* at ¶ 444.

providers function as gatekeepers and have all the tools necessary to deceive customers, degrade content or disfavor content.[34]

In the *Open Internet Order,* therefore, the FCC effectively reversed the *Cable Modem Order* and the *Broadband Access to the Internet Order*. Inexplicably, the Commission failed to restore the status quo *ante* by requiring broadband providers to make available to competitors stand-alone broadband transmission over the gateway last mile. As the FCC acknowledged, it is this very lack of competition that gives the broadband gatekeeper the power to abuse their customers and those entities seeking to interact with them. The FCC's failure to open the broadband networks to competition is arbitrary and capricious and must be overturned on reconsideration or appeal.

The Court will uphold regulations if the FCC has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Sorenson Communs., Inc. v. FCC*, 659 F.3d 1035, 1045 (10th Cir. 2011). (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)). The *Open Internet Order* is correct in finding that the rationale of the 2002 and 2005 decisions no longer applies, if it ever did, but refuses to take the next logical step: to reinstate the obligation of broadband providers to make available stand-alone last mile broadband transmission to competition. The FCC's forbearance from the interconnection provisions of the Telecommunications Act of 1996 and its weak lip service to Sections 201 and 202 of the Communications Act of 1934 give little assurance that it will fulfill

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[34] *Open Internet Order at* ¶5.

its statutory responsibilities to require interconnection with the gateway last mile networks in the public interest.

2. Forbearance from Truth-in-Billing Rules is Contrary to Stated FCC Policy.

In a single paragraph, the *Open Internet Order* at ¶ 522 dispenses with the Truth-in-Billing rules that the FCC took years to develop and refine and which are still being augmented due to the prevalence of deceptive billing practices in the industry, such as cramming. Rather than subject broadband providers to this set of carefully crafted, pro-consumer rules, the *Open Internet Order* prefers to start from scratch, presumably evaluating allegedly unreasonable billing practices in fresh proceedings under the general standards of Section 201(b).[35] This approach is a poor use of resources and creates uncertainty in according consumers the protections they expect under well-established FCC policies.

As support for forbearance from these consumer protections, the *Open Internet Order* at ¶¶495-6 relies on its general assertion that a tailored, incremental approach avoids disincentives to broadband deployment. It further relies on a suggestion by Public Knowledge that if certain critically important consumer protection rules such as Truth-in-Billing needed review, the FCC could "temporarily stay these rules [and] implement interim provisions." The *Open Internet Order* mischaracterizes this statement as a recommendation, and rejects the interim approach without addressing Public Knowledge's main point that these rules are vital to consumers and must be retained.

The *Open Internet Order* does not explain how application of the Truth-in-Billing rules could be a disincentive to broadband deployment and it would be hard pressed to come up with a

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[35] 47 U.S.C. §201(b).

rationale. Nor does the *Open Internet Order* assert that the Transparency Rules it adopts are an adequate substitute for the Truth-in-Billing rules; it could not, because the two sets of rules are not coextensive and differ in focus.

Finally, to appreciate the folly of forbearance here, one has only to consider how broadband Internet access service is offered to a wireless, cell-phone customer. Typically the service plans charge a monthly amount, say $40, for unlimited voice calling and texting. A smartphone user is required to purchase a data plan, say an additional $40 for 2 gigabytes of data. The user receives a single monthly bill that displays both charges and a common list of surcharges, taxes and fees. It makes no sense to consider the data charge to be broadband Internet access service, exempt from the Truth-in-Billing rules, while subjecting the rest of the services on the bill to these rules.

Reinstatement of the Truth-in-Billing rules is necessary to protect consumers and the FCC has put forth no good reason for its forbearance decision. Informed consumer choice helps competition and competition is good for consumers.

3. Forbearance from Universal Service Fund Contribution Obligations Perpetuates the Unfair Competitive Advantage of Large Facilities-Based Broadband Providers.

In a single paragraph, the *Open Internet Order* at ¶489 rationalizes its decision to forbear from Section 254(d) insofar as it would impose Universal Service Fund (USF) contribution obligations on broadband providers. While acknowledging that including broadband providers in the contributor base would benefit customers of other telecommunications services and improve the stability of the fund, the *Open Internet Order* declines to require USF contributions on the ground that the FCC and Joint Board are reassessing the USF contribution methodology. This purported balancing of interests is incomplete and unsupportable.

The broadband deployment mandate of Section 706 cannot conceivably justify forbearance from USF contribution obligations, which admittedly would strengthen the USF, a program whose goal is to bring broadband to unserved and underserved areas.[36] If anything, Section 706 militates in favor of including broadband services in the contribution base.

The FCC has been proposing to change the revenue-based USF contribution methodology since 2001, and has not done so in 14 years. The pendency of this well-worn proceeding is a poor excuse for continuing to exempt the large broadband providers from the USF contributions that other services make and that Verizon, AT&T and CenturyLink made until 2005 when the FCC freed them of the obligation.[37] Moreover, in the event the FCC does change the contribution methodology in the future, it can gain valuable experience by including broadband Internet access providers in the mix on reconsideration, and better gauge the effects of a potential change in methodology on industry segments and consumers.

If the FCC is concerned about the impact on broadband consumers of a small monthly USF charge, assuming the providers choose in their discretion to pass through their contributions to their customers, it has not said so. Elsewhere in the *Open Internet Order*, the FCC forbears from price regulation of broadband, even in locations where there is only a single broadband

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[36] "The FCC is reforming, streamlining, and modernizing all of its universal service programs to drive further investment in and access to 21st century broadband and voice services. These efforts are focused on targeting support for broadband expansion and adoption as well as improving efficiency and eliminating waste in the programs." http://www.fcc.gov/encyclopedia/universal-service.

[37] See, *Federal-State Joint Board on Universal Service et al., CC Docket No. 96-45 et al., Notice of Proposed Rulemaking*, 16 FCC Rcd 9892 (2001)

option for consumers, so it would be anomalous for it to balk at a surcharge that is a small fraction of the overall bill.[38]

The FCC's 2005 exemption of broadband Internet access service providers from the obligation to contribute to the USF (to which they had been contributing for years) created competitive and fairness imbalances, which the FCC on reconsideration must rectify. The *Open Internet Order* reaffirms the USF contribution obligations of the thousand or so small telephone companies that chose in 2005 to continue to offer broadband to their mostly rural customers as a Title II service under tariff. In other words, broadband customers in difficult to serve, rural areas must pay a monthly USF charge on their bill, while the customers of the large broadband Internet providers are exempt.[39] The inequality is glaring.

Another inequity in USF rules harms competition. While most independent ISPs went out of business as a result of the FCC's 2005 reclassification and decision to relieve broadband providers of the obligation to offer stand-alone transmission services under tariff, some have been able to continue to this day, and far more might enter the market if they were able to obtain broadband access to customers on reasonable terms. Large ILECs, like Verizon, may offer some last mile broadband to companies like Covad, which in turn may resell the broadband connections to independent ISPs at a marked up price. The FCC's USF rules treat Covad's

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[38] ¶ 451, "...because we do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future, we forbear from applying sections 201 and 202 to broadband services to that extent."

[39] For example, CenturyLink's Internet service is a DSL connection. The TV service it offers is a separate dish connection via DirectTV. Its Internet service, therefore, is the same as the DSL Internet service offered by the thousand small, rural telephone companies that chose for administrative convenience to continue under the Title II tariff regime. CenturyLink, because it detariffed, does not contribute to the USF and does not assess its DSL customers a USF surcharge, while the companies still under tariff must do so.

Further, wireless companies contribute and assess a USF charge based on the interstate voice portion of the bill. No USF contribution is made and no surcharge is assessed on the data plan, even though a customer is required to take a data plan. By reducing the voice/text unlimited charge and increasing the cost of mandatory data plans, as wireless providers have done in recent years, they minimize their contributions to the USF.

resale of these connections to independent ISPs as retail transactions for which it must contribute to the USF, and Covad passes the charges on to the ISPs. When Verizon uses its broadband connections for its own Internet access service, however, it contributes nothing to the USF. Independent ISPs are therefore put at an unfair competitive disadvantage, in no small part by the FCC's rules.

These competitive and inequitable harms are relevant to the FCC's forbearance decisions, since the FCC's overriding objective is to promote broadband deployment. The FCC must reconsider its forbearance from USF contribution obligations, since it has not given a convincing explanation of its reasons for continuing this exemption for broadband common carrier service, and indeed cannot do so.

C. **The FCC's Enforcement Mechanisms Must Include Public Participation.**

As discussed herein, the *Open Internet Order* relies far too heavily on individual case review of conduct by broadband Internet access providers. The FCC's failure to proscribe all forms of preferential treatment in the transmission of data bits, instead deferring to case-by-case consideration of so-called "sponsored data" plans, places an enormous follow-up burden on the agency. The FCC's enforcement mechanisms are inadequate to handle this burden and are seriously flawed, among other things, in that they preclude public participation.

The *Open Internet Order* at ¶ 152 relegates sponsored data plans to case-by-case review: "Accordingly, we will look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary." It is left unspecified whether, when and how the FCC will assess such practices. The *Open Internet Order* describes the various enforcement mechanisms at the FCC's disposal: a

new advisory opinion process, informal complaints, formal complaints, and investigations by the Enforcement Bureau.

Each of these mechanisms is essentially a private proceeding between one or two parties and the Enforcement Bureau with no opportunity for other interested persons, i.e., members of the public, to participate. The *Open Internet Order* says the new advisory opinions will be published, but it gives the public no right to participate prior to issuance of the advisory opinion and no right of appeal once it has been issued. Adherence to an advisory opinion assures the broadband provider that no enforcement action will be taken. While the FCC has modified its rules to facilitate the handling of informal and formal complaints involving open Internet matters and will designate an open Internet ombudsperson, the fact remains that the complaint process is cumbersome and costly and largely is limited to resolutions that do not go beyond the facts of the immediate case. Enforcement Bureau investigations routinely result in settlement agreements between the bureau and the carrier. Apart from making available to the public boilerplate orders and agreements that provide little insight into the violations or permit assessment of the adequacy of the settlement terms, it generally withholds underlying documents from public disclosure, and any that are disclosed, are so heavily redacted as to be useless.

The *Open Internet Order* appropriately devotes a great deal of attention to enforcement considerations. To the extent the FCC relies on its enforcement processes to ensure compliance in this area it must liberalize its rules on reconsideration to provide for greater public disclosure and public participation in Enforcement Bureau proceedings dealing with open Internet issues. The advisory opinion approach is especially troublesome. On the one hand, a broadband provider may face a legitimate potential for competitive harm if its operational plans are made public at the advisory opinion stage. On the other hand, closed dealings in which the carrier

shapes its plans into something that the Enforcement Bureau can live with are offensive. The FCC is a policy making regulatory agency and is not analogous to the Department of Justice in the degree of openness required in its decision-making. On reconsideration the FCC must either find a way to include meaningful public participation in the advisory opinion process or do away with advisory opinions. Similarly it must modify its rules to provide for greater public disclosure and public participation in all enforcement proceedings involving open Internet matters.

III. CONCLUSION

For the reasons set forth herein, the FCC must reconsider its *Open Internet Order* as set forth herein if it is to achieve its stated policy goals.

Respectfully Submitted,

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